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In the Supreme Court of the United States

OCTOBER TERM, 1931.

Nos. 34-35.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

WILLIAM KUHN,
Respondent.

IN ERROR TO THE COURT OF APPEALS OF PIKE COUNTY, OHIO.

BRIEF OF RESPONDENT.
(On the Merits.)

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35,719-35,720.

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STATEMENT AND ARGUMENT.

Respondent, William Kuhn, at the time he received his injury which completely destroyed the sight of an eye, was waiting at the place where he was injured because of a peremptory order that he had received from his foreman, Sturgill, and the reason that he was at that particular place at that particular time was proximately and solely because of this peremptory order from his foreman.

He was one of a "gang" consisting of eight or ten workmen. Ben DeLay, one of the gang, was using a maul striking a chisel in the hands of another member of the gang in cutting a rail that they were preparing to place in the track. The testimony in reference to the peremptory order was not denied and was testified to by a number of the members of the gang.

Although the record shows without contradiction that it was customary to have goggles in doing that kind of work, the foreman was in such a hurry to have the work done that he had not gone to or sent anyone to bring the goggles from the tool house which was a relatively short distance away. There is some evidence in the record to show that there were quite a number of pairs of goggles in the tool house, but the evidence is conflicting as to whether there would be just two pairs of goggles or not used by the men at the same time.

Some of the evidence shows that the employe using the maul and the employe using the chisel were the only two using goggles and the reason for only using two was because those would be the only members of the gang who would be within the zone of danger, but the evidence shows without contradiction that Kuhn, the man injured, was standing very close to DeLay, the man using the maul, solely because of the peremptory order. Of course where Kuhn stood he was within the zone of danger, but because of the great hurry to make the repairs in the track, which by reason of the disrepair had caused derailments, the use of goggles was entirely disregarded, for the first time, by all of the men in doing that kind of work.

The foreman, Sturgill, ordered that the men constituting the gang "to gang close to the end of the rail and take turns striking" (R. p. 31), or in the words of another witness, "stand there, gang up around here and don't be afraid." (R. p. 45.) Smith, another member of the gang, testified, "He (Sturgill) was hurrying us all up to get the steel cut and put it (rail) in" (R. p. 46). Another witness, "* * * We had orders to crowd up there and had orders to take it" (R. p. 52). Another witness, "Yes, he (Sturgill) was a little rash with it (orders)" (R. p. 53). Another witness, "He (Sturgill) was telling us what to do as far as I can remember. He was putting us at one

thing and then another. He said to hurry up and get it in. They told him to hurry, I guess, because they wanted to use that side track and we were doing our best to get it in" (R. pp. 55-56). Another witness, "It was a hurry up job" (R. p. 58). Another witness, "I heard orders to hurry up. Something said about getting that switch in. Step up close. Be ready to relieve that man that's hammering" (R. p. 63). Another witness "we (gang) were kind of rawhided there that morning" (R. p. 65).

The record clearly shows that it was never intended that railroad workmen should be within the danger zone without being protected by the use of goggles.

This case was tried twice in the State Common Pleas Court and each time the jury returned a verdict in favor of the plaintiff. The State Courts of Appeal reversed the first case but affirmed the second case and the Supreme Court of Ohio refused to interfere with the judgment in favor of Kuhn. It is claimed that in reference to the use of the goggles that Kuhn assumed the risk. The law of Ohio clearly gives Kuhn a right of recovery and the leading case in Ohio on this subject is *Van Duzen Gas & Gasoline Engine Company v. Schelies.*

> "A servant was called by the foreman of a common master to assist him in the adjustment of a machine, and was ordered to do a certain thing in connection with the work; this, to the knowledge of the servant, was dangerous; but he had a short time before done substantially the same thing under the foreman's order without accident; * * * The court left it to the jury to say whether, under all the circumstances, the risk of injury was so great, that no ordinarily prudent man would have obeyed the order; * * *"
>
> *Van Duzen Gas & Gasoline Engine Co. v. Schelies,* 61 O. S. 298.

The two exceptions to the application of assumption of risk are promise to repair and the obedience of a per-

emptory order. This principle of law is well recognized by the Supreme Court of the United States.

The Supreme Court of the United States in *Northern Pacific Railroad Company v. Egeland* where the facts showed that Egeland was a member of a section gang and while the train was moving Potter, the conductor, gave orders to the men to jump of; that Egeland then jumped to the platform which was some distance below the level of the car in which he was riding and was injured. Egeland jumped because, as he said, "he was told to by the conductor, and because he thought he could do so safely, or the conductor would not have given the order. He relied on the conductor's direction at the time he jumped * * *." —*Northern Pacific Railroad Co. v. Egeland*, 163 U. S. 94.

In the instant case the plaintiff, Kuhn, was required to stand next to DeLay who was doing the striking of the chisel. None of the men had goggles. All the members of the gang had obeyed the forceful order of the foreman. Should he be denied the right to recover in obeying the foreman because it is claimed that no reasonable man would have obeyed the foreman under the circumstances when, as a matter of fact, all of the members of the gang then obeyed the foreman? It is true that the record shows that they did not do so cheerfully or willingly for the foreman said to them, "move up and do not be *afraid*."

The late Judge Taft stated in his opinion in the case of *Narramore v. Railroad Company* that assumption of risk arises by contract, express or implied, and in no other way. A peremptory order has the same effect on assumption of risk as a promise to repair. Quoting from opinion of Judge Taft:

> "It makes logical that most frequent exception to the application of doctrine by which the employe who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise

of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it."

Citing with approval:

Hough v. Railway, 100 U. S. 213;
Railroad v. Babcock, 154 U. S. 190.

"From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury, pending the making of the repair."

Narramore v. Railroad Co., 96 Fed. 301-302.

The position of Kuhn close to the mauler DeLay at the time he was injured, was compelled by his foreman, for Kuhn was next in order to take the maul which had been used in doing the same work by employes other than DeLay. Kuhn himself had used the maul at least once and of course had seen the other employes use the maul and chisel and no injury had come to any of them. The condition of the chisel had been described by a number of the members of the gang, all of whom had been in a position to observe its condition. Kuhn had not been in any position where he could make any kind of accurate observation. The chisel, although in the possession of the railroad company, was not introduced in evidence. That in and of itself has been held to be evidence in favor of plaintiff.

"Where the evidence was conflicting as to whether a rope, the parting of which caused the death of a seaman, was defective, the doubt should be resolved against the vessel because of her failure to produce the rope which was in her possession."

The Luckenbach, 144 Fed. 980.

The record conclusively shows that the only opportunity that Kuhn had of making observations of the chisel was for the short period of time that the members of the

gang had been working at the particular job on this particular day. The United States rule of assumption of risk is that the servant must know, or in the exercise of ordinary care should have known the defective condition *and* the dangers necessarily incident to the use of the defective instrumentality.

The brief of opposing counsel is all predicated, in reference to assumption of risk, on a situation where no peremptory order had been given and the State and Federal courts and all of the textbooks clearly recognize the difference between the application of assumption of risk where no peremptory order had been given and a situation where the servant was working under a peremptory order.

Believing that the question of assumption of risk in the instant case was a mixed question of law and fact to be decided by the jury, we respectfully submit this brief.

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SUPREME COURT OF THE UNITED STATES.

Nos. 34 and 35.—October Term, 1931.

34	The Chesapeake and Ohio Railway Company, Petitioner, *vs.* William Kuhn.	On Writ of Certiorari to the Supreme Court of the State of Ohio.
35	The Chesapeake and Ohio Railway Company, Petitioner, *vs.* William Kuhn.	On Writ of Certiorari to the Court of Appeals of Pike County, State of Ohio.

[November 23, 1931.]

Mr. Justice McReynolds delivered the opinion of the Court.

While employed in interstate commerce as a section hand by petitioner, an interstate carrier, (Acts April 22, 1908, 35 Stat. 65; April 5, 1910, Chap. 143, 36 Stat. 291; U. S. Code Title 45, Chap. 2) William Kuhn suffered serious injury. Thereafter he sued the Company for damages in the Court of Common Pleas, Pike County, Ohio. He alleged that the accident resulted from its negligence in the following matters—Ordering him to use a defective sledge hammer and chisel; failing to promulgate and enforce proper rules concerning the upkeep of tools ordinarily used, to furnish guards or goggles for workmen's eyes, to provide a reasonably safe place for him to work.

The Company denied negligence. It also set up in defense that the plaintiff voluntarily assumed the risk incident to his employment. At the trial it duly, but unsuccessfully, requested a directed verdict because of such assumption.

The jury returned a verdict for the respondent. Judgment upon this was affirmed by the Court of Appeals; the Supreme Court denied a review. This Court allowed writs of certiorari both to the Supreme Court—No. 34, and the Court of Appeals—No. 35. The cause is properly here on the latter writ. Number 34 will be dismissed.

On the day of the accident, February 9, 1926, William Kuhn, an experienced section hand 54 years old, was engaged with others in repairing a side track leading from petitioner's main line to a steam shovel. It became necessary to remove two steel rails and shorten them some six or eight inches. They were first laid on the ground and then cut with a cold chisel. One man held the chisel while respondent and two others, acting in turn, struck it with a heavy hammer. None of them wore goggles; none asked for goggles or objected to the method of operation. The first rail had been severed; work had begun on the second. While respondent was standing by awaiting his turn to strike, a steel chip from the chisel or rail struck and destroyed his eye. On other occasions he had assisted in cutting steel rails when goggles were used and he knew chips would fly during such an operation. "That was the value of goggles," he testified. He understood the dangers incident to the undertaking. The job was a hurry-up one. The assistant foreman in charge had told the men "to gang up and go in a hurry, that he wanted to get through there." "Don't be afraid."

We think the evidence clearly discloses that Kuhn's injury resulted from the ordinary hazards of his employment, which he fully understood, and voluntarily assumed. There was no complaint, no promise by his superior to mitigate the obvious dangers. The trial judge should have directed a verdict for the Railway Company.

In cases like this, where damages are claimed under the Federal Employers' Liability Act, defense of the assumption of the risk is permissible and where the undisputed evidence clearly shows such assumption the trial judge should direct a verdict for the defendant. Moreover, in proceedings under that Act, wherever brought, the rights and obligations of the parties depend upon it and applicable principles of common law as interpreted and applied in the Federal courts. *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 508; *Chesapeake & Ohio R. R.* v. *De Atley*, 241 U. S. 310; *Boldt* v. *Pennsylvania, R. R.*, 245 U. S. 441, 445; *New Orleans & N. E. R. R.* v. *Harris*, 247 U. S. 367, 371; *Chicago, Milwaukee & St. Paul Ry.* v. *Coogan*, 271 U. S. 472, 474.

The court of appeals acted upon the erroneous theory that it should follow the views of the Supreme Court of the State rather than those of this Court in respect of questions arising under the

Liability Act. That statute, as interpreted by this Court, is the supreme law to be applied by all courts, Federal and State. Second Employers' Liability Cases, 223 U. S. 1, 57, 58. Where this view is not accepted, as in the present cause, it is within the power of this Court to determine and apply the proper remedy.

The judgment below is reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy,

Test:

Clerk, Supreme Court, U. S.